BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE M. TINOCO	)	
Claimant	)	
VS.	)	
	)	Docket No. 228,844
J. C. PENNEY COMPANY, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed the preliminary hearing Order dated May 13, 1998, entered by Administrative Law Judge Steven J. Howard.

ISSUES

The ALJ denied claimant's request for medical treatment finding claimant's condition preexisted the work-related accident and the thumb injury for which claimant is seeking treatment was inconsistent with the mechanism of injury given. Respondent does not dispute that claimant suffered personal injury by accident on the date alleged. Respondent does dispute, however, that the accident caused injury to claimant's thumb. The issue for Appeals Board review is whether the thumb condition for which surgery has been recommended is the result of the November 11, 1997, accident that arose out of and in the course of claimant's employment with respondent.

Respondent also raises an issue concerning the Appeals Board's jurisdiction to consider this issue on an appeal from a preliminary hearing order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board will first address the issue concerning its jurisdiction. Respondent stipulated and admitted that claimant sustained an accident on the date alleged and that the accident arose out of and in the course of his employment. Respondent denied, however, that claimant's thumb condition was related to the accident. The Appeals Board considers this issue to be jurisdictional because it gives rise to a disputed question of whether claimant's injury arose out of and in the course of his employment. The causation

of claimant's thumb condition is the issue and not the nature and extent of any resulting disability.

Respondent argues that the Board is without jurisdiction because the ALJ's ruling concerned only the issue of additional medical treatment which is not one of the issues the Board has jurisdiction to review under K.S.A. 1997 Supp. 44-534a. Respondent cites three prior Appeals Board decisions in support of this argument: Naff v. Davol, Docket No. 204,405 (May 1997); Rayman v. Spears Manufacturing, Docket No. 213,649 (May 1997); and, Briceno v. Wichita Inn West, Docket No. 211,226 (February 1997). Those Board decisions, however, all dealt with the issue of whether the ALJ exceeded his or her jurisdiction by authorizing medical treatment with a specific physician without first giving the respondent an opportunity to provide a list of three physicians from which claimant could select a treating doctor. That was not an issue in this case as respondent agreed to the physician claimant was requesting should the thumb condition be determined a compensable injury. At page 3 of the transcript of the May 12, 1998, preliminary hearing, the Court announced:

> The record should reflect the claimant is making a claim for occupational accident on November the 11th, 1997. Respondent makes all admissions regarding the compensability for purposes of today's preliminary hearing.
>
> The question is whether or not claimant's thumb is related to the occupational accident of November the 11th, 1997.
>
> Claimant is requesting medical authorization of Dr. Toby. **Respondent has agreed that Dr. Toby is an appropriate physician to provide care if the thumb is a covered item related to the occupational accident.** (Emphasis added.)

Since the respondent agreed to the authorization of Dr. Toby, the question of whether respondent should be afforded the opportunity to submit a list of three names was never an issue.

The Appeals Board finds it has jurisdiction to review the ALJ's denial of medical treatment based upon his finding that "[c]laimant's condition is pre-existing and is inconsistent with the mechanism of injury given" because this appeal involves a disputed issue of whether the injury arose out of and in the course of claimant's employment. *See* K.S.A. 1997 Supp. 44-534a(a)(2).

Claimant has worked for respondent since 1993. His job duties involved loading merchandise on trailers for delivery by UPS. On November 11, 1997, he was closing the doors on the loading dock when he felt a pop in his thumb. He described these doors as similar to garage doors. Claimant related that the door was high and he had to jump up to grab the handle. Claimant described the door as approximately 9 feet high and 8 feet

wide and weighing between 75 and 90 pounds. This occurred towards the end of claimant's shift. Claimant did not notice any specific injury to his thumb initially but that evening he noticed that a bone in his thumb appeared out of position and the next morning when he awoke he could he not move his thumb.

Claimant reported this to his supervisor and respondent sent claimant initially to Dr. Tim Kloiber who referred claimant to plastic and reconstructive surgeon Regina M. Nouhan, M.D. Dr. Nouhan first saw claimant on November 13, 1997, and diagnosed a "swan-neck deformity of the right thumb with what appears to be some dorsal subluxation of the CMC joint of the thumb. There seems to be secondary hyperextension at the MP joint and some flexion at the IP joint." X-rays were obtained which showed significant degenerative changes at the CMC joint. Claimant was instructed to return to Dr. Nouhan for a recheck on November 17, 1997. Dr. Nouhan's records for that date show that she told claimant "that I think this process has been going on for some time but certainly there could have been recent worsening." Surgery was recommended. Claimant agreed to the surgery but respondent did not.

Because the surgery recommended by Dr. Nouhan was not authorized by respondent, claimant obtained an independent medical examination from hand surgeon Lynn D. Ketchum, M.D. Dr. Ketchum diagnosed a congenital abnormality of the first metacarpal that may have been caused by an old fracture. But, in addition, he found "obvious hyperextension of the MP joint." Dr. Ketchum's opinion was that claimant's work-related accident aggravated a pre-existing condition in claimant's thumb that was either a congenital anomaly or an old fracture with arthritis and ankylosis of the CMC joint. He agreed with Dr. Nouhan that surgery would be necessary.

Thereafter, claimant was sent by respondent to orthopedic surgeon, E. Bruce Toby, M.D. A CT scan of the thumb was obtained. Based upon the CT scan and the plain x-rays, Dr. Toby concluded that claimant's deformity was the result of some pre-existing trauma. Claimant, however, denied any prior problems or injury to his thumb. But Dr. Toby said that history "does not correlate with his CT scan or his plain x-rays. It is possible that he could have had some injury that made his pre-existing problem more severe, but there is no doubt that this is of long standing duration and the mechanism of injury that he gives does not seem, in my mind, to be consistent with this tremendous amount of bowing of the first metacarpal and the osteoarthritis."

Dr. Toby agreed that claimant needed surgery, but said the operation would be significantly more involved than the procedure contemplated by Dr. Nouhan.

Respondent argues that the opinion by Dr. Toby is the most credible because he was the only one of the three physicians that had the benefit of a CT scan. The Board agrees that Dr. Toby's opinion should be given more weight for this reason. Nevertheless, the Board does not read Dr. Toby's report as eliminating the work-related accident as a contributing factor. Instead, Dr. Toby rules out the mechanism of the work-related accident

alone as explaining the abnormalities found on the x-rays and CT scan. The reports by all three doctors are consistent with a conclusion that the work-related accident aggravated a pre-existing condition.

Claimant testified that his thumb was asymptomatic before the work-related accident. Even if that accident has only accelerated the need for corrective surgery, such medical treatment is covered by the Workers Compensation Act. The test is not whether the injury causes the condition, but whether the injury aggravates or accelerates the condition. Where a pre-existing condition is aggravated by an accidental injury arising out of and in the course of employment, claimant is entitled to compensation. *See* Baxter v. L.T. Walls Constr. Co., 241 Kan. 588, 738 P.2d 445 (1987); Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978); and, Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated May 13, 1998, entered by Administrative Law Judge Steven J. Howard should be, and hereby is, reversed and this matter is remanded to the Administrative Law Judge for further orders on claimant's request for medical treatment consistent with the above findings and conclusions.

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

c: Carl D. Gum III, Kansas City, MO
Kip A. Kubin, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director